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CITATIONS

710354—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 323

JOE W. BUICE, PETITIONER

v.

COLONEL HOWARD S. PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 15–22) is reported at 155 F. 2d 429.

JURISDICTION

The judgment of the circuit court of appeals was entered May 20, 1946 (R. 22). The petition for a writ of certiorari was filed July 22, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether on petition for a writ of habeas corpus seeking petitioner's release from military custody the trial judge was justified in disbelieving petitioner's testimony that he was never actually inducted into the Army.

STATEMENT

On July 9, 1945, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts seeking his release from military custody on the ground that he had never taken the oath of induction and was therefore not within the jurisdiction of the Army (R. 2-5). In response to a Summons to Show Cause (R. 5-6) issued by the district court, respondent produced petitioner in court on the return day, July 30, 1945, and thereupon, without objection by petitioner, a hearing on the merits was had (R. 7, 8, 16).

The evidence adduced at the hearing was summarized in an agreed statement of facts upon which the appeal was heard and decided by the Circuit Court of Appeals for the First Circuit (R. 8-11). In summary, that statement shows that on examination by his counsel petitioner testified that he was a Jehovah's Witness and had been classified I-A under the Selective Training and Service Act of 1940 after claiming exemption as a minister of religion (R. 8-9); that in

response to an induction order he reported to his draft board on November 22, 1942, and was sent to Fort Sam Houston, San Antonio, Texas (R. 9); that while being physically examined "he told the heart doctor that he would refuse to serve in the Army and that he would refuse to take the oath because he was one of Jehovah's Witnesses and had been refused classification as a minister" (R. 9); that after being found physically fit and acceptable for general military service, and being called upon to take the oath "he went up to a desk and spoke to a non-commissioned officer, told him his name and said that he was going to refuse to take the oath. The non-commissioned officer said that they had been looking for him. They told him that there was nothing they could do and that whether or not he took the oath he was still in the Army. The oath was administered to the group, but though he was in the same room he stood aside from the rest of the group" (R. 9); that he did not sign any of the papers with respect to an allotment nor did he name any beneficiary or sign any other papers with the exception of one to the effect that he did not want any insurance (R. 9); that, as ordered, he returned to Fort Sam Houston on December 2, 1942, where he again "had conversation with the officer in charge to the effect that he was not subject to military jurisdiction and that he would not take the oath of induction. The officer, how-

ever, told him that he was in the Army" (R. 9); that thereafter he was assigned to a company but was not asked to do anything (R. 9); that he signed for a uniform but did not accept any pay from the Army, took no insurance, received no allotments, and at all times refused to work in any capacity whatsoever (R. 10); that he refused at various times to salute officers, take orders from Army authorities, or to fulfill various assignments given him (R. 9-10); that [probably late in 1942 or early 1943] he was sentenced by court martial to six months' imprisonment for refusal to obey an order of his commanding officer (R. 10); that after serving this sentence he was transferred to a camp at Aberdeen, Texas (R. 10); that "upon his arrival there he walked out of camp" and remained at liberty until his apprehension by the Federal Bureau of Investigation in June 1945 (R. 10). Upon cross examination petitioner admitted that while at one Army camp he went through an infiltration course involving military tactics and the use of firearms (R. 11). Respondent presented no witnesses and rested after cross-examining the petitioner (R. 11).

On August 1, 1945, the district court dismissed the petition and in a memorandum opinion stated that (R. 8): "The petitioner's story, coming at this late date and unsupported by other evidence, is not sufficient to warrant a finding that he was never inducted into the military service." On

appeal to the Circuit Court of Appeals for the First Circuit, the order was affirmed (R. 22).

In its opinion, the court below noted that while the procedure in the district court was unusual in that there was a hearing on the merits, with respect to the legality of the detention complained of, on the return of the Order to Show Cause instead of after the writ itself had issued and return thereon had been made (R. 16), it saw no reason why petitioner should be given another opportunity to litigate the merits, in the absence of objection by counsel for the petitioner at the time the hearing on the merits was had in the district court (R. 16–17). The court then concluded: (1) that the memorandum opinion of the district judge could not be construed as a ruling that petitioner's delay in instituting the habeas corpus proceedings constituted a waiver of his right to challenge the jurisdiction of the military authorities by this means, but rather as a finding by the trial judge that "Buice's uncorroborated testimony, in view of his delay in petitioning for a writ of habeas corpus, [was] insufficient to sustain the burden resting upon him to make it appear somewhat more probable than otherwise that he had never been formally inducted into the military service" (R. 19); (2) that under the Federal Rules of Civil Procedure now applicable to habeas corpus proceedings on appeal, it could not "set aside the findings of fact made by a

district court in a habeas corpus case unless, giving due regard to the opportunity had by the trial court to judge the credibility of the witnesses, its finding is clearly erroneous" (R. 19); and (3) that even though in some cases it would be clearly erroneous not to believe uncontradicted testimony "so many factors affect credibility that it is hard to conceive of a situation in which we could say that it was clearly erroneous for a trial court to disbelieve, or find insufficient, oral testimony, even if uncontradicted, given with respect to a basic issue by a party having the burden of persuasion" (R. 19–20). The opinion pointed out the several bases upon which the district judge would have been justified in disbelieving petitioner's testimony, such as his failure to bring habeas corpus in the three years which intervened from the date of his induction, during much of which time he had opportunity and reason to seek his release by such means (R. 20); "by the fact that after acceptance by the military authorities, and witnessing, at least, the administration of the oath of induction to the others in his group, he reported back to his induction station after furlough according to orders, that he signed for, was issued, and for a time apparently wore a uniform; and that at Camp Edwards after his arrest he made no objection to taking a course in military tactics involving the use of firearms" (R. 21).

ARGUMENT

The petition for a writ of certiorari urges that error was committed below in (1) dismissing the petition for a writ of habeas corpus, since a prima facie case entitling petitioner to the issuance of the writ was established both by the petition and petitioner's undisputed testimony (Pet. 13–18); (2) holding that the delay in seeking relief by way of a petition for a writ of habeas corpus and other circumstances relied on warranted dismissal of the petition (considering the case as though procedurally the hearing on the merits was proper) (Pet. 19–25); and (3) holding that petitioner had by his delay in seeking the writ waived the lack of jurisdiction of the Army (Pet. 8, 26–28). The last contention is without foundation since, as noted above, the circuit court of appeals stated that the trial judge's memorandum opinion could not be construed as a ruling that there had been a waiver (see p. 5, *supra,* and R. 19). As to the other arguments, we think the reasoned opinion of the court below amply demonstrates: (1) that petitioner was not prejudiced by the unorthodox procedure in the district court, in which he joined without objection,[1] and (2) that the trial judge,

[1] Even assuming, *arguendo*, that petitioner had established a prima facie case entitling him to issuance of the writ of habeas corpus and that the trial judge should not have held a full hearing on the merits until there had been a proper return and petitioner had an opportunity to file a traverse,

as the trier of facts, was entitled to disbelieve petitioner's story.

Petitioner argues (Pet. 8) that the judgment below is in direct conflict with the decisions in *Billings* v. *Truesdell,* 321 U. S. 542; *Ex parte Yost,* 55 F. Supp. 768 (S. D. Cal.), affirmed, *Lawrence* v. *Yost,* decided June 27, 1946 (C. C. A. 9); *United States* v. *Flint,* 54 F. Supp. 889 (D. Conn.); and *In re Herman,* 56 F. Supp. 733 (N. D. Tex.). In all these cases the petitions for a writ of habeas corpus were filed within a few days or months of the challenged induction. Here, however, petitioner delayed filing for three years, thereby rendering open to question his belated version of the induction. Petitioner's explanation of the delay, that he assumed prior to this Court's decision in the *Billings* case on March 27, 1944, that petitioning for a writ of habeas corpus would be futile, was properly not accepted by the court below because it found no "evidence in the record from which it could either be found or reasonably inferred that Buice was aware of the legal situation prevailing prior to the decision of the *Billings* case" (R. 21).

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petitioner was not prejudiced, since he is not precluded from filing another petition for a writ of habeas corpus and, on a proper hearing on the merits, adducing additional evidence, if available, sufficient to establish the illegality of his detention by the Army.

There are, moreover, other bases for not accepting petitioner's story. The trial judge might have disbelieved him because of his failure to explain why he reported at the induction station if he did not intend to submit to induction. It will be recalled that in 1942 the general practice for registrants who did not intend to submit to induction was flatly to refuse to go to the induction station. And it was only after the *Billings* decision that the practice of reporting for induction but refusing to be inducted first developed. Petitioner, however, prior to that decision, voluntarily reported at the induction station and at that time was inducted without the exercise by the induction station authorities of such force or duress as led to the conclusion, in the *Billings* case, that the induction was involuntary. Further doubt is cast upon petitioner's story by the fact that after his post-induction furlough, he voluntarily returned to Fort Sam Houston, in accordance with the orders he had received at the time of induction. Cf. *Ex parte Yost, supra,* where the petitioner, after refusing to take the oath, left the induction station and reported back to his local draft board that he had refused to take the oath and was not going to report back to the Army.

It is urged that the trial judge was bound to accept petitioner's testimony, since it was un-

contradicted (Pet. 21–24). But the fact that testimony is uncontradicted does not necessarily require its acceptance. This Court has said that:

> Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.[2]

In the instant case, the circumstances were such that the trial judge properly disregarded petitioner's claim as inherently improbable. Apart from the possibility that the manner in which

[2] *Quock Ting* v. *United States*, 140 U. S. 417, 420–421; see also 9 Wigmore, *Evidence* (3d ed. 1940) sec. 2495, at p. 310.

petitioner testified may have given rise to doubts of his sincerity, his claim that he was not actually inducted was discredited by several patent omissions in his own account. Thus, he failed to explain why he reported for induction at a time when the prevailing practice on the part of those contesting military jurisdiction was to the contrary; he gave no reason for reporting back to the Army after his induction furlough; he did not claim or show that the induction was accomplished by force or that he made any protest or refusal other than to taking the oath; and he presented no adequate or convincing reason for his three-year delay in challenging the induction. Considering these collective circumstances together with the fact that had petitioner unequivocally resisted induction in 1942, he would have faced criminal prosecution for that refusal, now barred by the statute of limitations, it seems clear that the trial judge properly rejected petitioner's story as inherently improbable and merely a belated attempt to bring himself within the doctrine of the *Billings* case.

Two courts having found against petitioner on the facts, there is now no occasion for further review of the same facts by this Court.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the case turns on a determi-

nation of credibility made by the trial judge. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946